No. 06-278

In the Supreme Court of the United States

DEBORAH MORSE, JUNEAU SCHOOL BOARD, PETITIONERS

v.

JOSEPH FREDERICK, RESPONDENT

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF FOR D.A.R.E. AMERICA, DRUG FREE AMERICA FOUNDATION, INC. NATIONAL FAMILIES IN ACTION, SAVE OUR SOCIETY FROM DRUGS, HON. WILLIAM J. BENNETT, AND GENERAL BARRY R. MCCAFFREY AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

LINDA T. COBERLY
WILLIAM P. FERRANTI
Winston & Strawn LLP
35 West Wacker Drive
Chicago, Illinois 60601
(312) 558-5600

GENE C. SCHAERR
Counsel of Record
STEFFEN N. JOHNSON
Winston & Strawn LLP
1700 K Street, N.W.
Washington, D.C. 20006
(202) 282-5000

Counsel for Amici Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether the First Amendment allows public schools, at school-sponsored, faculty-supervised events, to prohibit students from displaying messages promoting the use of illegal substances.

2. Whether the Ninth Circuit departed from established principles of qualified immunity in holding that a public high school principal was liable in a damages lawsuit under 42 U.S.C. § 1983 when, pursuant to the school district's policy against displaying messages promoting illegal substances, she disciplined a student for displaying a large banner with a slang marijuana reference at a school-sponsored, faculty-supervised event.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

INTRODUCTION AND INTERESTS OF *AMICI CURIAE* 1

STATEMENT OF THE CASE 2

SUMMARY OF THE ARGUMENT 3

ARGUMENT 5

I. Teenage Drug Abuse Is A Problem Of Enormous Proportions Requiring An Array Of Policy Solutions And The Full Involvement Of School Officials. 5

II. The Ninth Circuit's First Amendment Analysis Is Unworkable And Wrong Because It Undermines Legitimate Anti-Drug Policies And Forces Schools To Tolerate Offensive Speech. 12

A. The Ninth Circuit's Standard Will Not Allow School Officials To Respond Effectively To Disruptive Speech. 13

B. Schools Are Entitled To Prohibit Student Speech That School Officials Reasonably Believe Is Plainly Offensive To The Educational Mission. 17

III. The Ninth Circuit's Decision Rests On A Fundamental Misunderstanding Of Qualified Immunity. 22

CONCLUSION 24

APPENDIX A 1a

TABLE OF AUTHORITIES

Page(s)

CASES:

Anderson v. *Creighton*, 483 U.S. 638 (1987) 23

Bethel Sch. Dist. No. 403 v. *Fraser*, 478 U.S. 675 (1986) ..... *passim*

Bd. of Educ. v. *Earls*, 536 U.S. 822 (2002) 7

Bd. of Educ. v. *Pico*, 457 U.S. 853 (1982) 17

Boroff v. *Van Wert City Bd. of Educ.*, 220 F.3d 465 (6th Cir. 2000) 18

Brown v. *Bd. of Educ.*, 347 U.S. 483 (1954) 21

Davis Next Friend LaShonda D. v. *Monroe County Bd. of Educ.*, 526 U.S. 629 (1999) 20

Gonzales v. *Raich*, 545 U.S. 1 (2005) 18

Hazelwood Sch. Dist. v. *Kuhlmeier*, 484 U.S. 260 (1988) 3, 17-18, 21

Malley v. Briggs, 475 U.S. 335 (1986) 22

Saucier v. Katz, 533 U.S. 194 (2001) 22

Tinker v. *Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) ..... *passim*

Veronia Sch. Dist. 47J v. *Acton*, 515 U.S. 646 (1995) 7, 20

Williams v. *Spencer*, 622 F.2d 1200 (4th Cir. 1980) 14, 18

STATUTES:

20 U.S.C. § 7114 21

CONSTITUTIONAL PROVISIONS:

U.S. Const. amend. I ..... *passim*

MISCELLANEOUS:

Alaska Dep't of Health & Social Services and Alaska Dep't of Educ. & Early Development, *Alaska Youth Risk Behavior Survey 2003*, available at http://www.epi.hss.state.ak.us/pubs/YRBS/2003/YRBS%202003.pdf. 6

Ann B. Bruner & Marc Fishman, *Adolescents and Illegal Drug Use*, 280 JAMA 597 (1998) 7

Centers for Disease Control & Prevention, *Youth Risk Behavior Surveillance—United States 2005*, 55 MMWR Surveillance Summaries No. SS-5 (June 9, 2006), available at http://www.cdc.gov/mmwr/ PDF/SS/SS5505.pdf. 6

L.D. Johnston, *et al.*, *Monitoring the Future National Results on Adolescent Drug Use: Overview of Key Findings, 2005* (NIH Pub. No. 06-5882), available at http://www.monitoringthefuture.org/pubs/monographs/overview2005.pdf. 5, 6, 10

L.D. Johnston, *et al.*, *Monitoring the Future National Survey Results on Drug Use, 1975-2005. Vol. I: Secondary School Students* (NIH Pub. No. 06-5883), available at http://www.monitoringthefuture.org/pubs/monographs/vol1_2005.pdf 10-11

Revathy Kumar, *et al.*, *Effects of School-Level Norms on Student Substance Abuse*, 3 Prevention Sci. 105 (June 2002)..... 11-12

Office of National Drug Control Policy, *The Economic Costs of Drug Abuse in the United States, 1999-2002* (Dec. 2004) (Executive Office of the President, Pub. No. 207303), available at http://www.whitehousedrugpolicy.gov/publications/economic_costs 9

Julia O'Malley, *Students and officials discuss teen drug use*, Juneau Empire, Nov. 26, 2002 6

Elizabeth B. Robertson, *et al.*, *Preventing Drug Use Among Children and Adolescents: A Research-Based Guide for Parents, Educators, and Community Leaders* (2d ed. 2003) (NIH Pub. No. 04-4212(A)), available at http://www.drugabuse.gov/pdf/prevention/RedBook.pdf 19

Substance Abuse & Mental Health Services Admin., *The NSDUH Report: Academic Performance and Substance Use among Students Aged 12 to 17: 2002, 2003, & 2004* (2006), available at http://www.oas.samhsa.gov/2k6/academics/academics.cfm 8-9

Substance Abuse & Mental Health Services Admin., *The NSDUH Report: Marijuana Use and Delinquent Behaviors Among Youths* (2004), available at http://www.oas.samhsa.gov/2k4/MJdelinquency/MJdelinquency.cfm 9

Substance Abuse & Mental Health Services Admin., *The NSDUH Report: Youth Violence and Illicit Drug Use* (2006), available at http://www.oas.samhsa.gov/2k6/youthViolence/youthViolence.cfm 9

Substance Abuse & Mental Health Services Admin., *Results from the 2005 National Survey on Drug Use & Health: National Findings* (Office of Applied Studies, NSDUH Series H-30, DHHS Pub. No. SMA 06-4194), available at http://www.oas.samhsa.gov/nsduh/2k5nsduh/2k5Results.htm 5, 8, 10, 11

Substance Abuse & Mental Health Services Admin., *State Estimates of Substance Use from the 2003-2004 National Surveys on Drug Use and Health* (Office of Applied Studies, NSDUH Series H-29, DHHS Pub. No. SMA 06-4142), available at http://www.oas.samhsa.gov/2k4state/pdf/2k4state.pdf 6

Marianne B.M. van den Bree & Wallace B. Pickworth, *Risk Factors Predicting Changes in Marijuana Involvement in Teenagers*, 62 Arch. Gen. Psychiatry 311 (March 2005).....8, 10, 12

INTRODUCTION AND INTERESTS OF *AMICI CURIAE*

If allowed to stand, the Ninth Circuit's tortured misapplication of the rules governing student speech will severely undermine our schools' ability to protect students from the grave dangers of drug abuse. The susceptibility of teens to pro-drug messages is evidenced by the fact that *half* of American secondary school students have used drugs illegally by graduation, often on school property. Given the magnitude of the drug problem, and the health and safety concerns underlying policies like the Juneau School Board's, the Board and Principal Morse acted properly and well within their discretion as educators to create and enforce a policy that prohibited students from promoting illegal drug use.

The Ninth Circuit's failure to give *any* consideration, much less proper weight, to the school's interest in teen drug use led it to misapply this Court's student speech decisions. The court's attempt to limit *Bethel School District No. 403* v. *Fraser*, 478 U.S. 675 (1986), to its facts is particularly ill-considered: pro-drug messages are as "plainly offensive" to a school's educational mission as messages containing sexual innuendo. Contrary to the Ninth Circuit's conclusion, the First Amendment does not require hamstringing school officials in the fight against illegal drug use by our nation's teens.

That prospect is of particular concern to *amici curiae*—consisting of two former directors of the White House Office of National Drug Control Policy and leading national nonprofit organizations dedicated to fighting substance abuse (described more fully in Appendix A).[1]

---

[1] The parties have consented to the filing of this brief, and their letters of consent are on file with the Clerk. In accordance with Rule 37.6, *amici* state that no counsel for any party has authored this brief in whole or in part, and no person or entity, other than the *amici*, has made a monetary contribution to the preparation or submission of this brief.

These *amici* believe that strong anti-drug policies in our schools are vital to addressing illegal drug use by teens.

Amici further believe that preventing schools and school officials from prohibiting pro-drug displays under the aegis of the First Amendment not only endangers our children, but is also inconsistent with settled First Amendment law. School officials bear the weighty responsibility of fighting illegal drugs and sending students a clear message that drug use will not be tolerated. At a minimum, those officials must not be held *personally* liable for enforcing school policies prohibiting students from advocating illegal drug use when no court has heretofore even suggested that doing so is unconstitutional; the stakes of over-deterrence are too high to limit qualified immunity so severely.

STATEMENT OF THE CASE

Standing across from his high school, and in full view of the assembled student body, Joseph Frederick and several of his classmates unfurled a fourteen-foot banner reading "BONG HITS 4 JESUS." As these *amici* can attest, most students would have readily understood "BONG HITS" as referring to smoking marijuana through a water pipe. See also Joint App. 24, 117.

The principal asked the students to take down the banner—which Frederick has never claimed to be religious speech—because it violated school district policies prohibiting messages that advocate illegal drug use. Frederick refused, so Principal Morse confiscated his banner and gave him a ten-day suspension for that and other misconduct. See Pet. App. 2a-4a.

The school district superintendent and the Juneau School Board upheld Frederick's suspension (though the superintendent reduced it to time served, which was eight days). *Id.* at 4a. The District Court held that Principal Morse and the Juneau School Board had not violated Frederick's constitutional rights, and that, in any event,

they were protected by qualified immunity. See *id.* at 23a-44a.

The Ninth Circuit reversed, however, holding that the Constitution gives students the right to advocate—during a school event—that their classmates use illegal drugs. As far as the court was concerned, Frederick's message was more like the anti-war armbands in *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969), than the sexual innuendo running through the nomination speech in *Fraser*. See Pet. App. 8a-9a. In addition, the court held that *Hazelwood School District* v. *Kuhlmeier*, 484 U.S. 260 (1988), which recognized the right of school authorities to restrict objectionable content in a school newspaper, was irrelevant because "no sponsorship or curricular activity was involved" in Frederick's display of a fourteen-foot banner, in front of school property, during a school event, to the student body. Pet. App. 10a-11a.

To make matters worse, notwithstanding the fact that the superintendent, the school board, and the district court all agreed that Frederick's conduct was not constitutionally protected, the Ninth Circuit held Principal Morse *personally* liable because "no reasonable government official could have believed the censorship and punishment of Frederick's speech to be lawful." *Id.* at 21a.

SUMMARY OF THE ARGUMENT

The decision below is fundamentally misguided as a matter of sound educational policy, and should be reversed under settled principles governing the speech rights of school students and the entitlement to qualified immunity of school officials.

I. Teenage drug abuse is an enormous national problem. It endangers the health and well-being of millions of children and undermines the educational mission of our schools.

The approach to student speech taken by the decision below, however, threatens to make vital anti-drug policies unenforceable. By requiring a case-by-case evaluation of pro-drug speech, and prohibiting any action unless a message causes an immediate and palpable disturbance in an "educational and curricular" activity, the decision below makes it difficult, if not impossible, for schools to address the cumulative effects of pro-drug advocacy.

II. Contrary to the Ninth Circuit's decision, the First Amendment does not require school officials to remain neutral when faced with pro-drug messages in the midst of a school activity. Such speech is "plainly offensive" under this Court's decision in *Fraser*, and schools are entitled to prohibit it.

Moreover, as *Fraser* and several other decisions of this Court recognize, courts must defer to decisions of school officials like those at issue here. The primary responsibility for regulating our public schools lies with school authorities and local communities, not the federal courts.

III. These principles demonstrate not only the flaws in the Ninth Circuit's constitutional analysis, but also the absurdity of the court's decision on qualified immunity. The stakes are too high to allow school officials to be sued for enforcing policies never before so much as questioned by any federal court. The threat of personal liability for the slightest misstep will chill enforcement of anti-drug policies far beyond the requirements of the First Amendment, compromising the health and well-being of public school children nationwide.

ARGUMENT

I. Teenage Drug Abuse Is A Problem Of Enormous Proportions Requiring An Array Of Policy Solutions And The Full Involvement Of School Officials.

The constitutionality of Principal Morse's conduct cannot fairly be determined without considering the depth and breadth of teenage drug abuse.

1. In 2005, 2.9 million Americans tried drugs for the first time, and more than half (56%) of those new drug users were under the age of 18.[2] Twenty-one percent of eighth-graders have used drugs—which means that on average six students in a classroom of 30 children, each about fourteen years old, have already used at least one illicit drug.[3] By tenth grade, another 17% of students have used drugs, bringing the total up to 38%. And "exactly *half* of American secondary school students today have tried an illicit drug by the time they near high school graduation."[4]

---

[2] Substance Abuse & Mental Health Services Admin., *Results from the 2005 National Survey on Drug Use & Health: National Findings* ("*2005 NSDUH*") at 46 (Office of Applied Studies, NSDUH Series H-30, DHHS Pub. No. SMA 06-4194), available at http://www.oas.samhsa.gov/nsduh/2k5nsduh/2k5Results.htm.

[3] L.D. Johnston, *et al.*, *Monitoring the Future National Results on Adolescent Drug Use: Overview of Key Findings, 2005* ("*2005 MTF Overview*") at 5 (NIH Pub. No. 06-5882), available at http://www.monitoringthefuture.org/pubs/monographs/overview2005.pdf. Monitoring the Future is an ongoing study of the behavior and attitudes towards drug use of American secondary school students, college students, and young adults. Begun in 1975, the study is funded by research grants from the National Institute on Drug Abuse, which is part of the National Institutes of Health. The 2005 study was conducted by researchers at the University of Michigan's Institute for Social Research.

[4] *Id.* (emphasis added).

Unfortunately the problem is deeper than students experimenting once or twice. Thirty-eight percent of high school seniors have used drugs within the last year, and 23% *within the last month.*[5] Particularly alarming for school officials, 4.5% of high school students reported that they had used marijuana in the last month *on school property*, and 25% reported that drugs had been offered to them (or by them) at school in the past year.[6]

In Alaska, the teen drug problem is particularly severe, and especially with marijuana. Among Alaska teens ages 12 to 17, past-month drug use is a staggering 14.6%, the second-highest rate in the country.[7] Sixty percent of Juneau students have used marijuana by the time they graduate from high school.[8] And among high school students, 6.5% reported using marijuana on school property within the last thirty days, and 13.1% reported that they had used marijuana for the first time *before* they turned 13.[9]

---

[5] *Id.* at 48, 52. The national incidence of marijuana use alone is 44.8% by twelfth grade. *Id.* at 44.

[6] Centers for Disease Control & Prevention, *Youth Risk Behavior Surveillance—United States 2005*, 55 MMWR Surveillance Summaries No. SS-5 at 19 (June 9, 2006), available at http://www.cdc.gov/mmwr/PDF/ss/ss5505.pdf.

[7] See Substance Abuse & Mental Health Services Admin., *State Estimates of Substance Use from the 2003-2004 National Surveys on Drug Use and Health* at Appendix B, Table B.1 (Office of Applied Studies, NSDUH Series H-29, DHHS Pub. No. SMA 06-4142), available at http://www.oas.samhsa.gov/2k4state/pdf/2k4state.pdf. In addition to ranking second in youth drug use, Alaska has the highest rate of *overall* drug use (that is, by all residents ages 12 and up), at 11.79%. *Id.*

[8] Julia O'Malley, *Students and officials discuss teen drug use*, Juneau Empire, Nov. 26, 2002, reprinted at Joint App. 110-16.

[9] Alaska Dep't of Health & Social Services and Alaska Dep't of Educ. & Early Development, *Alaska Youth Risk Behavior*

2. This Court has recognized the troubling implications of drug use at such an early age:

> "School years are the time when the physical, psychological, and addictive effects of drugs are most severe. Maturing nervous systems are more critically impaired by intoxicants than mature ones are; childhood losses in learning are lifelong and profound; children grow chemically dependent more quickly than adults, and their record of recovery is depressingly poor. And of course the effects of a drug-infested school are visited not just upon the users, but upon the entire student body and faculty, as the educational process is disrupted."

Veronia Sch. Dist. 47J v. *Acton*, 515 U.S. 646, 661-62 (1995) (internal citations and quotation marks omitted).

As this Court noted just five years ago, moreover, "[t]he drug abuse problem among our Nation's youth has hardly abated since *Vernonia* was decided in 1995. In fact, evidence suggests that it has only grown worse. . . . [T]he nationwide drug epidemic makes the war against drugs a pressing concern in every school." *Bd. of Educ.* v. *Earls*, 536 U.S. 822, 834 (2002).

Indeed, although drug use is a scourge at any age, teen drug use is simply devastating. "Drug use, especially in early adolescence, interferes with normal cognitive, emotional, and social development and is closely linked with both psychiatric disorders and delinquency."[10] The problems with marijuana use alone are well-documented: "Short-term risks of marijuana use include traffic accidents and unprotected sex. In addition, marijuana use

---

Survey 2003 at 20-21, available at http://www.epi.hss.state.ak.us/pubs/YRBS/2003/YRBS%202003.pdf.

[10] Ann B. Bruner & Marc Fishman, *Adolescents and Illegal Drug Use*, 280 JAMA 597, 597 (1998).

is associated with lack of motivation; greater involvement with and inability to quit other substances; psychiatric problems, including depression, schizophrenia, anxiety, suicide, conduct problems, antisocial behavior, and criminal behavior; and reduced chances of participation and stability in adult roles (eg, dropping out of school, abortion, unemployment, and divorce)."[11]

Unsurprisingly, teens do not handle drug use well. Nearly *half* of all drug-using teens needed treatment for a drug problem in 2005.[12] That means that some 1.3 million children (4.9% of all youths ages 12 to 17) have a serious drug problem, though only a fraction actually receive specialty treatment.[13]

Even worse, our most troubled teens are the ones most plagued by drugs. Rates of substance abuse are more than twice as high among teens who experienced a major depressive episode in the past year (38%) than among teens who have not (18%).[14] Students who used marijuana in the past month were less likely to have an A or B grade average.[15] Youths who used an illicit drug in the past year

---

[11] Marianne B.M. van den Bree & Wallace B. Pickworth, *Risk Factors Predicting Changes in Marijuana Involvement in Teenagers*, 62 Arch. Gen. Psychiatry 311, 311 (March 2005) (internal footnotes omitted).

[12] *2005 NSDUH*, *supra* note 2, at 17, 80. By comparison, 38% of *all* drug users 12 years of age and older needed treatment for their drug problem in 2005. *Id.* at 13 (8.1% of persons 12 or older were drug users), 78 (3.1% of persons 12 or older needed treatment for an illicit drug use problem).

[13] *Id.* at 80.

[14] *Id.* at 92.

[15] Substance Abuse & Mental Health Services Admin., *The NSDUH Report: Academic Performance and Substance Use among Students Aged 12 to 17: 2002, 2003, & 2004* (2006),

were almost twice as likely to have engaged in violent behavior as those who did not, and the likelihood of engaging in such behavior increased with the number of drugs a student used.[16] This same pattern is found with marijuana use alone—which is directly correlated with delinquent behaviors, including fighting, stealing, selling drugs, and carrying a handgun.[17]

3. Early intervention is crucial to limiting the damage that drugs cause. Drug use cost our country $180.9 billion in 2002, including $128.6 billion in lost productivity,[18] no small part of which traces back to drug use in adolescence.

---

available at http://www.oas.samhsa.gov/2k6/academics/academics.cfm (72.2% of non-users had A or B average; 58.0% of those using marijuana on 1 to 4 days in the past month; 44.9% of those using marijuana on 5 or more days).

[16] Substance Abuse & Mental Health Services Admin., *The NSDUH Report: Youth Violence and Illicit Drug Use* (2006), available at http://www.oas.samhsa.gov/2k6/youthViolence/youthViolence.cfm (49.8% of users versus 26.6% of non-users; 45.6% of users of one illicit drug versus 61.9% of users of three or more illicit drugs).

[17] Substance Abuse & Mental Health Services Admin., *The NSDUH Report: Marijuana Use and Delinquent Behaviors Among Youths* (2004), available at http://www.oas.samhsa.gov/2k4/MJdelinquency/MJdelinquency.cfm. For example, when asked whether they had attacked someone in the past year with the intent to cause serious injury, 5.9% of youths with no past-year marijuana use answered yes, compared to 11.4% of youths who used marijuana 1 to 11 days in the past year, 21.1% of youths who used 50 to 99 days, and 32.9% of youths who used 300 or more days. *Id.*

[18] Office of National Drug Control Policy, *The Economic Costs of Drug Abuse in the United States, 1999-2002* (Dec. 2004) (Executive Office of the President, Pub. No. 207303), available at http://www.whitehousedrugpolicy.gov/publications/economic_costs.

Once a child uses drugs, the risk of continuing to use illicit substances throughout adolescence and into adulthood increases dramatically. Children who use marijuana for the first time before they turn 15 are more than *five times as likely* to find themselves in trouble with drugs as adults than if they had not used marijuana until at least 18 years of age.[19] And in one study, 73% of teens who used marijuana regularly, and 55% of those who tried it experimentally, *were still using the drug one year later*.[20]

Indeed, the strongest predictors of marijuana use by teens are past substance use by themselves and their peers; delinquency; and problems in school.[21] This "suggests that the greatest opportunities for intervention are during earlier stages of marijuana involvement. During later stages, genetic and other biological factors involved in habituation and dependence may become increasingly important and treatment, more difficult."[22]

4. In fighting student drug use, norm-reinforcing messages are crucial. Students are more likely to use drugs if they do not think drugs are dangerous. And when students' collective perception of the risks of drug use change—for better or for worse—rates of student drug use quickly follow.[23] When it comes to illegal drugs, it is no

---

[19] *2005 NSDUH*, *supra* note 2, at 69 ("In 2005, among adults aged 18 or older who first tried marijuana at age 14 or younger, 13.3 percent were classified with illicit drug dependence or abuse, higher than the 2.4 percent of adults who had first used marijuana at age 18 or older.").

[20] Van den Bree & Pickworth, *supra* note 11, at 315.

[21] *Id.* at 315, 317.

[22] *Id.* at 317 (internal footnote omitted).

[23] *2005 MTF Overview*, *supra* note 3, at 12 (a change in high school students' perception of the risk of marijuana use predicts a change in actual use in subsequent years); see also L.D.

surprise that a high school senior is more likely to share the attitudes of his peers than those of his parents.[24] At the same time, while they are susceptible to their peers' opinions about drugs, students *do* respond to anti-drug messages. Marijuana use, for example, is far less severe among youths who perceive strong disapproval from their parents.[25]

In fact, the research shows that schools have a particularly important role to play in providing an atmosphere conducive to healthy decision-making. Drug and alcohol use is less pervasive among students who report being exposed to drug or alcohol prevention messages at school than it is for those who do not recall being exposed to anti-drug messages.[26] And one study recently determined that, quite simply, "*[s]tudents are more likely to use substances when the norms in school reflect a greater tolerance for substance use.* These

---

Johnston, *et al.*, *Monitoring the Future National Survey Results on Drug Use, 1975-2005. Vol. I: Secondary School Students* ("*2005 MTF*") at 391-92 (NIH Pub. No. 06-5883), available at http://www.monitoringthefuture.org/pubs/monographs/vol1_2005.pdf. Student drug use has been on a gradual decline the past several years, though there is an ominous indication in the 2005 data suggesting that this trend may be changing. See *2005 MTF Overview*, *supra* note 3, at 5 ("The 8th graders have been the first to show turnarounds in illicit drug use: they were the first to show the upturn in use in the early 1990s and the first to show the decline in use after 1996; they now appear to be the first to show an end to the declines observed in recent years.").

[24] *2005 MTF*, *supra* note 23, at 390, 425-27.

[25] *2005 NSDUH*, *supra* note 2, at 62 ("Current marijuana use [*i.e.*, within the last 30 days] also was much less prevalent among youths who perceived strong parental disapproval for trying marijuana or hashish once or twice than for those who did not (*4.6 vs. 27.0 percent*).") (emphasis added).

[26] *Id.* at 65 (past month use of illicit drugs for youths ages twelve to seventeen, 9.2% vs. 13.2%).

findings hold even after controlling for students' own disapproval and for other student and school demographic characteristics."[27] This means that by creating an "environment of disapproval of substance use," schools can influence not only how students *think* about using illicit substances, but also how they *feel* about doing drugs.[28]

In short, in the fight against teen drug use, it is clear that "[s]chools can make a difference. School administrators, teachers, and students can all work together to create an environment where substance use is actively disapproved."[29]

But to foster this protective environment, school officials must not be required to stand silently by while students advocate illegal drug use. They must be permitted to adopt and enforce a policy that prohibits students from promoting the use of illegal drugs.

II. The Ninth Circuit's First Amendment Analysis Is Unworkable And Wrong Because It Undermines Legitimate Anti-Drug Policies And Forces Schools To Tolerate Offensive Speech.

The Ninth Circuit's decision seriously, and erroneously, undermines our schools' ability to carry out vital anti-drug policies. Under the Ninth Circuit's

---

[27] Revathy Kumar, *et al.*, *Effects of School-Level Norms on Student Substance Abuse*, 3 Prevention Sci. 105, 121 (June 2002) (emphasis added) (studying marijuana use, daily cigarette smoking, and heavy alcohol consumption).

[28] *Id.* at 121-22.

[29] *Id.* at 122; see also van den Bree & Pickworth, *supra* note 11, at 316 ("Schools can play a role in shaping the development of socially approved conduct, and active discouragement of substance use in schools can be effective.") (internal footnotes omitted) (study of risk factors related to adolescent marijuana use).

approach, school officials may not interfere unless and until a particular instance of pro-drug advocacy causes an immediate, palpable, and severe disturbance—and only during an "educational and curricular" activity, no less. As we now show, this standard seriously compromises the ability of our public schools to promote a drug-free environment. And it has no basis in this Court's First Amendment decisions, which clearly do not require a school to tolerate student speech advocating illegal drug use.

A. The Ninth Circuit's Standard Will Not Allow School Officials To Respond Effectively To Disruptive Speech.

The impact of the Ninth Circuit's decision on school officials' ability to promote a drug-free environment is well illustrated by the facts of this case. Here, Frederick unfurled a fourteen-foot banner reading "BONG HITS 4 JESUS" at a school event, and Principal Morse intervened to enforce school board policies expressly prohibiting student advocacy of illegal drug use.[30] The Ninth Circuit's condemnation of Principal Morse's actions under these circumstances demonstrates that the court has adopted a completely unworkable standard of conduct for school officials charged with responding to potentially disruptive student speech.

1. In contrast to *Tinker*, where "the wearing of armbands . . . was entirely divorced from actually or

---

[30] See Juneau School Board Policy 5520, reprinted at Pet. App. 53a-54a (prohibiting "any assembly or public expression that . . . advocates the use of substances that are illegal to minors"); Juneau School Board Policy 5721, reprinted at Pet. App. 54a-57a (prohibiting distribution on school premises of materials that "advocate the use by minors of any illegal substance or material"); Juneau School Board Policy 5850, reprinted at Pet. App. 58a ("Pupils who participate in approved social events and class trips are subject to district rules for student conduct . . . .").

potentially disruptive conduct by those participating in it," 393 U.S. at 505, Frederick's display of the banner here caused an immediate disturbance that Principal Morse was fully justified in stopping. The court's search for an additional disruption beyond the banner itself was unnecessary. As this Court has held, "conduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech." *Tinker*, 393 U.S. at 513.

And even if the display of the banner was not sufficient *actual* disruption, schools are not required to tolerate "interference, actual *or nascent*, with the schools' work or of collision with the rights of other students . . . ." *Id.* at 508 (emphasis added). Here, the school's well-founded fear of increased student drug use is ample justification for the school's policy of not tolerating any student speech like Frederick's. The risk of increased drug use makes such advocacy a "material and substantial interference with schoolwork or discipline." *Id.* at 511; see also *Williams* v. *Spencer*, 622 F.2d 1200, 1205 (4th Cir. 1980) (concluding that judicial notice should be taken that "encouraging the use of drugs encourages actions which in fact endanger the health or safety of students").

The decision below is unworkable for another reason as well: it requires school officials to evaluate each instance in which a student advocates breaking the law to determine whether *that* particular speech is likely to substantially disrupt the school's educational mission. But this requirement would make it impossible for school officials to adopt and enforce policies to address the cumulative effect of pro-drug messages.

If permitting such messages would disrupt the work of schools in educating our children and protecting their health—and these *amici* can attest that it would—then

public schools must be allowed to act even where the disruptive effect of a single incident is not palpable. This need could hardly be clearer than it is here, where Frederick's "BONG HITS" banner was at least temporally, and perhaps causally, linked to incidents of pro-drug graffiti in the high school after the event.

Worse still, the decision below adopts a totally unworkable standard for determining whether a particular disciplinary measure is appropriate. Here the Ninth Circuit concluded that confiscating Frederick's banner was not necessary because his speech caused no *further* disruption (beyond the pro-drug graffiti, of course). But that is simply because Principal Morse took action immediately, before further disruptions occurred. A standard that treats a *successful* intervention as proof that an intervention was *unnecessary* makes no sense.

To the contrary, Principal Morse should not have been required to wait for Frederick or one of his classmates to take a "bong hit" before she could lawfully confiscate Frederick's banner. Nor should she have been required to wait and see whether Frederick's fellow classmates would start a ruckus. First Amendment rights—and liability for their breach—should not turn on whether a group of volatile teenagers is well-behaved at a particular moment.

2. This Court should likewise reject the Ninth Circuit's arbitrary distinction between activities that are "educational and curricular," and activities that are not. That distinction is captured in the lower court's statement that "[o]ne can hypothesize off-campus events for which the students might be released that would be educational and curricular in nature *and would be disrupted by school speech such as Frederick's*. . . . But a Coca Cola promotion as the Olympic torch passed by on a public street was not such an event." Pet. App. 12a (emphasis added).

Distinguishing school activities in this way conflicts with this Court's understanding of the educational process: "The process of educating our youth for

citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order." *Fraser*, 478 U.S. at 683. If an activity is school-sponsored and faculty-supervised, it should not matter whether it is held entirely on school property or, as here, partly on and partly off campus. Nor should it matter whether the activity is considered fun or boring by the students.

In addition, neither the schools nor the courts can fairly administer the Ninth Circuit's line. Schools cannot be expected to determine whether a particular field trip or activity is or is not "curricular." Where do "extra-curricular" events fall? Are the free speech rights of the students in the math club different from those of students on the traveling basketball team? What about student participants as compared to student spectators? Can officials treat a visit to an amusement park the same as a trip to a national monument? If not, is a trip to the zoo more like the park or the monument?

Even if some sort of classification system is conceivable, it makes no sense to require school officials to refrain from enforcing standard school policies if they determine—or fear that a *court* would determine—that an activity is more recreational than educational. Advocating illegal drug use is no less serious because a school-sponsored, faculty-attended event falls on one side or the other of this line.[31]

In all events, overseeing a typology of school-related activities is not the proper role for the courts. This Court

---

[31] The impossibility of administering such a distinction is further demonstrated by the Ninth Circuit's treatment of the Olympic Torch Relay, a major international event. Contrary to the decision below, Coca Cola's support for that event did not diminish its scholastic value. Corporate sponsorship is ubiquitous for sporting events and cultural activities of all sorts, from the Olympics, to a city's concerts-in-the-park program.

has repeatedly stated that "the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges." *Kuhlmeier*, 484 U.S. at 273 (citing cases); see also *Fraser*, 478 U.S. at 683 ("The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board."); *Bd. of Educ.* v. *Pico*, 457 U.S. 853, 863 (1982) ("The Court has long recognized that local school boards have broad discretion in the management of school affairs."); *Tinker*, 393 U.S. at 507 ("the Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools").

The Ninth Circuit's arbitrary isolation of "curricular activities" improperly shifts authority from school officials to the federal courts. Regulating student conduct is a task for our schools, school officials, and the parents and citizens who operate the school boards, not the federal judiciary.

B. Schools Are Entitled To Prohibit Student Speech That School Officials Reasonably Believe Is Plainly Offensive To The Educational Mission.

Fortunately, this Court's First Amendment decisions not only offer no support for the Ninth Circuit's analysis, they affirmatively refute it.

1. Foremost, the Court has long held that the First Amendment does not protect "plainly offensive" messages that tend to promote disruption and diversion in our public schools. See *Fraser*, 478 U.S. at 683. In holding that Frederick had a constitutional right to display his banner, the decision below violated the fundamental principle running through this Court's student speech cases that "[a] school need not tolerate student speech that

is inconsistent with its 'basic educational mission.'" *Kuhlmeier*, 484 U.S. at 266.

The Ninth Circuit acknowledged this principle but misapplied it when it argued that "[t]he phrase 'Bong Hits 4 Jesus' may be funny, stupid, or insulting, depending on one's point of view, but it is not 'plainly offensive' the way sexual innuendo is." Pet. App. 9a. To the contrary, advocating that one's classmates engage in illegal drug use—which is what Principal Morse and the Ninth Circuit believed Frederick's banner was doing, see *id.* at 6a-7a—is *at least* as offensive to the school's educational mission and the health of Frederick's classmates as the phallic metaphor at issue in *Fraser*. In fact, the decision below itself exemplifies the perception that the Juneau School Board policy is designed to combat: that illegal drug use by high school students is no big deal.[32]

In short, the Ninth Circuit recognized that *Fraser* permits the restriction of "plainly offensive" speech that promotes diversion from the educational process, particularly for adolescents. See Pet. App. 16a-17a n.44. But the court effectively limited *Fraser* to its facts, holding that it only permits schools to prohibit sexually lewd or vulgar messages. *Id.* at 9a. That was error. This strict cabining of the "offensive" speech category is flatly contrary to the rationale of *Fraser*. See also *Boroff* v. *Van Wert City Bd. of Educ.*, 220 F.3d 465, 471 (6th Cir. 2000); *Williams*, 622 F.2d at 1205-06 (pre-*Fraser* decision holding that disruption was not necessary for school to ban advertisement encouraging drug use). *Fraser* is not about social *sensibilities*; it is about the unique needs and

---

[32] Even if Alaska law were as "complicated" as the Ninth Circuit thought, Pet. App. 6a n.4—and it is not—the "issue of 'illegal' drug use" is *not* complicated under federal law. Cf. *Gonzales* v. *Raich*, 545 U.S. 1 (2005). Frederick has never claimed that he was making a political statement about legalization. Rather, he was trying to cause a disturbance and get attention by advocating illegal drug use.

susceptibilities of minor students. That is, under *Fraser* the First Amendment permits schools to restrict speech simply because it poses more of a danger to immature students than to mature adults. See 478 U.S. at 683 ("The speech could well be seriously damaging to its less mature audience, many of whom were only 14 years old and on the threshold of awareness of human sexuality.").

That is true here. "Research has shown that the key risk periods for drug abuse occur during major transitions in children's lives."[33] Children are likely to encounter drug abuse for the first time during adolescence, as they move into the greater social and academic pressure of middle school.[34] "Then, when they enter high school, young people face additional social, psychological, and educational challenges. At the same time, they may be exposed to greater availability of drugs, drug abusers, and social engagements involving drugs."[35]

Pro-drug speech is particularly distracting, and dangerous, to students. When it comes from their peers, this is the kind of speech that students are likely to heed. If left unanswered by school officials, moreover, such speech may be the *only* speech other students hear. And speech advocating drug use is every bit as harmful to students as sexually suggestive remarks. At a minimum, public school officials are entitled to think so; they have every right not to look the other way when a student at a school-sponsored event advocates illegal drug use.

---

[33] Elizabeth B. Robertson, *et al.*, *Preventing Drug Use Among Children and Adolescents: A Research-Based Guide for Parents, Educators, and Community Leaders* at 9 (2d ed. 2003) (NIH Pub. No. 04-4212(A)), available at http://www.drugabuse.gov/pdf/prevention/RedBook.pdf.

[34] *Id.*

[35] *Id.* at 10.

2. The decision below also flies in the face of this Court's repeated admonition that the responsibility for educating our children lies with school officials. The Ninth Circuit's crabbed reading of *Fraser* and its non-deferential review of Principal Morse's analysis of what constitutes "plainly offensive" speech oversteps the limited role that courts ought to play in the administration of public school education. The decision below does not even *mention* the deference owed to school board policies and to the decisions of the school officials who apply those policies. Rather, it proceeds on the assumption that courts, rather than schools, have the exclusive say on what manner of speech is "plainly offensive" to the educational functions of the public schools.

Indeed, the difference between school authorities and other government instrumentalities seems to have escaped the Ninth Circuit's notice. "Public schools," the court wrote, "are instrumentalities of government, and government is not entitled to suppress speech that undermines whatever missions it defines for itself." Pet. App. 12a. This simplistic analysis ignores the fact that school authorities act *in loco parentis* and must be permitted enough discretion to fulfill that function. As this Court observed in *Davis Next Friend LaShonda D.* v. *Monroe County Board of Education*, "'the nature of [the State's] power [over public schoolchildren] is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults.'" 526 U.S. 629, 646 (1999) (quoting *Veronia*, 515 U.S. at 655). Indeed, "the necessity for the State to act is magnified by the fact that this evil is being visited not just upon individuals at large, but upon children for whom it has undertaken a special responsibility of care and direction." *Veronia*, 515 U.S. at 662.

The Court recognized in *Fraser* that school authorities must be allowed "to protect children—especially in a captive audience—from exposure to sexually explicit, indecent, or lewd speech." 478 U.S. at 684. The same is

true for student speech advocating the use of illegal drugs. This amount of control is essential for our schools to fulfill their role as "a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." *Kuhlmeier*, 484 U.S. at 272 (quoting *Brown* v. *Bd. of Educ.*, 347 U.S. 483, 493 (1954)); see also *Fraser*, 478 U.S. at 686 ("I wish therefore, . . . to disclaim any purpose . . . to hold that the Federal Constitution compels the teachers, parents, and elected school officials to surrender control of the American public school system to public school students.") (quoting *Tinker*, 393 U.S. at 526 (Black, J., dissenting)).

Here, had Principal Morse failed to react to Frederick's inappropriate display, she would have foregone an opportunity to teach her students—including Frederick—that they should be law-abiding citizens. And she would have failed to protect her students from further exposure to a harmful message.

As these *amici* know from first-hand experience, the legitimacy of the anti-drug imperative is by now beyond question. Drugs are highly destructive to the learning environment and, as discussed above, social norms are vital to combating drug use, particularly at the high school level. Preventing student drug use—what the decision below wrongly dismissed as "a vaguely-defined 'educational mission,'" Pet. App. 16a—is embodied in concrete policies in place at most public schools, and in federal anti-drug and educational funding laws that shape school curricula.[36] These laws were enacted, and the policies of the Juneau School Board adopted, to deal with

---

[36] See, *e.g.*, 20 U.S.C. § 7114(d)(6) (requiring school districts funded by the Safe and Drug Free Communities Act to periodically certify that their programs "convey a clear and consistent message" that illegal drug use is "wrong and harmful.").

the very real and substantial drug problem facing our schools and our children. These types of interests—and public school officials' assessment of them—are a necessary part of the First Amendment analysis in cases like this one.

III. The Ninth Circuit's Decision Rests On A Fundamental Misunderstanding Of Qualified Immunity.

Perhaps the most startling aspect of the decision below is the holding that the school officials here can be *personally* liable for their actions based upon the court's cavalier assertion that the free speech rights it strained to recognize were "clearly established." Having held that *general principles* gleaned from factually-dissimilar cases established Frederick's right to display a "BONG HITS" banner, the Ninth Circuit then concluded that Principal Morse's immunity defense should fail because a reasonably competent public official is expected to know the law and how to apply that law to her conduct. Pet. App. 21a.

But this reasoning rests on a fundamental misunderstanding of qualified immunity. The whole point of the qualified immunity analysis is to determine whether a public official's mistake of law is reasonable. "The concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct. . . . If the officer's mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense." *Saucier* v. *Katz*, 533 U.S. 194, 105 (2001). Put another way, qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley* v. *Briggs*, 475 U.S. 335, 341 (1986).

Principal Morse's decision was not "plainly incompetent." She reached a reasoned, and reasonable, conclusion that Frederick's banner was "inconsistent with the district's basic educational mission to promote a

healthy, drug-free life style," and that she had to enforce school policy prohibiting Frederick's message as part of the "district's responsibility to teach students the boundaries of socially appropriate behavior." Pet. App. 3a (quoting Petitioners' interrogatory answers). Even if Frederick's speech is protected under the particular circumstances of this case—and it is not—Principal Morse is entitled to qualified immunity.

The Ninth Circuit's decision to the contrary—that a newly proclaimed judicial gestalt is "clearly established" constitutional law—is as dangerous as it is wrong. It is obvious that "permitting damages suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties." *Anderson* v. *Creighton*, 483 U.S. 635, 638 (1987).

Indeed, in the context of public school education, the costs of an improperly calibrated qualified immunity standard go well beyond the financial. Among other things, it puts at risk the health of our students. If the threat of litigation intimidates school officials into tolerating student advocacy of illegal drug use, more students are likely to engage in more unhealthy behavior. Moreover, the increased threat of litigation is likely to force school officials to be more tolerant of disruptions in and around the classroom, making public school education less effective and resulting in students entering the world less prepared than they could have been.

The interests underlying anti-drug policies—and many other school policies—are too important for school officials to be over-deterred by the threat of personal liability for any misstep. Public schools must be allowed to promote a drug-free environment and cultivate their students' fullest potential, which means that school officials must be free to make reasonable judgments to enforce reasonable school

policies under novel circumstances. Any other rule would be unfair to school officials and detrimental to students.

CONCLUSION

The decision below should be reversed.

Respectfully submitted.

LINDA T. COBERLY
WILLIAM P. FERRANTI
Winston & Strawn LLP
35 West Wacker Drive
Chicago, Illinois 60601
(312) 558-5600

GENE C. SCHAERR
Counsel of Record
STEFFEN N. JOHNSON
Winston & Strawn LLP
1700 K Street, N.W.
Washington, D.C. 20006
(202) 282-5000

Counsel for Amici Curiae

JANUARY 2007

APPENDIX

APPENDIX A

D.A.R.E. America is a nonprofit organization that supports the drug resistance efforts of communities nationwide. The D.A.R.E. (Drug Abuse Resistance Education) program is a police officer-led series of classroom lessons that teaches children from kindergarten through 12th grade how to resist peer pressure and live productive drug and violence-free lives. The D.A.R.E. program is implemented in 75% of our nation's school districts and more than 43 countries worldwide. D.A.R.E. America provides officer training and student educational materials, and supports the development, implementation, and evaluation of the D.A.R.E. curriculum.

Drug Free America Foundation, Inc. ("DFAF") is a nonprofit drug prevention and policy organization committed to policies and laws that will reduce illegal drug use, drug addiction, drug-related injury, and death. DFAF has formed several divisions to further this goal, including the *International Science and Medical Forum on Drug Abuse*, which reviews current articles and published research and provides the public with scientific knowledge about narcotics in an understandable form; the *Institute on Global Drug Policy*, an alliance of physicians, scientists, attorneys and drug specialists who advocate public policies to curtail the illegal use of alcohol or harmful drugs; and *Students Taking Action Not Drugs*, a DFAF division comprised of college students concerned about drug and alcohol abuse at college campuses who provide information to their peers about the dangers of drugs, and help direct young people into treatment.

National Families in Action is a nonprofit organization whose mission is to help families and communities prevent drug abuse among children by promoting strategies based on science and law. With Wake Forrest University School of Medicine, the organization co-sponsors the Addiction Studies Program for Journalists and the Addiction Studies Program for State Legislatures. In 2003, it began the Parent Corps,

patterned after the Peace Corps, which recruits, trains, employs, and supervises Parent Leaders. Each Parent Leader works out of his or her child's school to educate and mobilize the school's parents into preventing the use of alcohol, tobacco, and illegal drugs among students. In the pilot program, 20 Parent Leaders in 19 schools in nine states have recruited 11,500 members: 6,500 parents in the Parent Corps and 5,000 students in the Youth Corps, founded at the request of students.

Save Our Society From Drugs ("S.O.S.") is a nonprofit organization committed to establishing, encouraging and enabling drug laws and drug policies that reduce illegal drug use and abuse, drug-related injury, and death. S.O.S. has been involved in opposing and educating citizens about state ballot initiatives and legislative measures to legalize drugs.

The Honorable William J. Bennett served as United States Secretary of Education from 1985-1988 and he was the first Director of the White House Office of National Drug Control Policy, serving in that post from 1989-1990. Dr. Bennett also served as chairman of the National Endowment for the Humanities from 1981-1985. He has written and edited 16 books, including *The Book of Virtues*, *The Children's Book of Virtues*, and the first of a two-volume history, *America: The Last Best Hope*. Dr. Bennett is also the host of a nationally broadcast radio show, "Bill Bennett's Morning in America."

General Barry R. McCaffrey served as Director of the White House Office of National Drug Control Policy from 1996-2001, a tenure longer than any of his predecessors. He was confirmed for this position by unanimous vote by the U.S. Senate. For this period of public service, General McCaffrey received many honors including: the United States Department of Health and Human Services' Lifetime Achievement Award for Extraordinary Achievements in the Field of Substance Abuse Prevention, the United States Coast Guard

Distinguished Public Service Award, the Norman E. Zinberg Award of the Harvard Medical School, the Federal Law Enforcement Foundation's National Service Award, and the Community Anti-Drug Coalitions of America Lifetime Achievement Award. Prior to serving as the nation's Cabinet Officer for U.S. drug policy, General McCaffrey served in the United States Army for 32 years and retired as a four-star General. At retirement he was the most highly decorated serving General, having been awarded three Purple Heart medals for wounds received in his four combat tours, as well as twice awarded the Distinguished Service Cross, the nation's second highest award for valor. He also twice was awarded the Silver Star for valor.